BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KATHLEEN CLIFTON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,007,183
BOMBARDIER AEROSPACE/LEARJET	)	
Respondent	)	
AND	)	
	)	
GALLAGHER BASSETT	)	
Insurance Carrier	)	

ORDER

Claimant appeals the September 16, 2003 preliminary hearing Order of Administrative Law Judge John D. Clark. Claimant was denied benefits after the Administrative Law Judge found that timely notice pursuant to K.S.A. 44-520 was not provided.

ISSUES

Did claimant provide timely notice of accident as is required by K.S.A. 44-520?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be affirmed.

Claimant worked as a final assembly supervisor for respondent through February of 2002, when, as a result of layoffs and work reductions, she was returned to the floor as a mechanic. Claimant testified the floor work was much more strenuous than her supervisory responsibilities, requiring that she lift up to 50 pounds with help and up to 20 pounds alone on a regular basis. Claimant testified that she started developing back problems as a result of these jobs. Claimant testified that by May of 2002, she was having pain into her legs. On the morning of May 6, 2002, claimant awoke unable to get out of bed due to the pain. She contacted her supervisor, Scott McClure, and advised him that she was going to the doctor for treatment for the pain.

Claimant testified that she told Mr. McClure that her back pain was due to her return to the floor, although she did not specify the mechanic job, just the return to the floor work. Mr. McClure testified at preliminary hearing that at no time did claimant tell him that her ongoing back problems were the result of the mechanic work on the floor.

Claimant's history is significant in that she underwent back surgery in 1984 as a result of a car accident and had neck surgery in 1992 as a result of a second car accident. The 1992 neck surgery resulted in a fusion. Claimant was on pain medication from these surgeries, leading up to the time when she transferred from supervisor to floor mechanic in February of 2002.

Claimant went to her family doctor, Jed D. Holmes, M.D., and was ultimately referred to Alan Moskowitz, M.D., of the Kansas Joint and Spine Institute. Claimant was diagnosed with degenerative lumbar disc disease for which she was treated with epidural steroid injections. An MRI displayed disc degeneration throughout the lumbar spine. Dr. Moskowitz ultimately recommended surgery, and an anterior discectomy and fusion followed by a posterior fusion from L3 through S1 were performed on November 5, 2002. Dr. Moskowitz opined that claimant's work-related incident exacerbated an underlying condition of degenerative disc disease.

Claimant testified that she spoke with Mr. McClure, her supervisor, on several occasions about her ongoing pain complaints. Mr. McClure acknowledged that claimant discussed the pain problems, but never related them to her work. He was aware of claimant's prior back difficulties and injuries, and was under the impression her ongoing back pain was related to those preexisting conditions.

Upon leaving respondent's employment in May of 2002, claimant completed the paperwork to obtain short-term disability benefits. The form asked whether or not the condition was work related. Claimant left the workers' compensation section of that form unmarked. Claimant also filled out a leave of absence form, which also requested information regarding the type of leave. Claimant indicated she was taking FMLA leave due to a serious health condition, but again left the section involving workers' compensation blank.

Additionally, claimant failed to report any accident to Health Services and failed to request any workers' compensation medical care from respondent. Claimant's work as a supervisor involved her in workers' compensation situations. Claimant acknowledged she was familiar with guidelines for reporting work-related accidents. She testified that in the past she had been involved in the creation of accident reports when a work injury resulted. Claimant, however, testified that she was unaware that microtrauma situations were considered accidents for which an accident report would be created. However, on cross-examination, claimant was provided an accident report on a former employee that claimant supervised. That employee had filled out an accident report alleging carpal tunnel

syndrome, which claimant acknowledged was not a traumatic event but, instead, was a series of accidents. Respondent, during its cross-examination of claimant, presented a work ID badge which stated on the back that it was the employee's obligation to notify First Aid of any workplace accidents.

Claimant's family doctor, Dr. Holmes, completed a "Fitness for Duty Certification" on September 13, 2002, indicating that claimant's current symptoms were not related to her work.

Claimant did provide the testimony of a coworker named Charles D. Hendricks. Mr. Hendricks alleged that he heard a conversation between claimant and her supervisor, Mr. McClure, discussing her back difficulties. Mr. Hendricks acknowledged, however, that he could not specify the time frame when that conversation allegedly took place and could not even come close to estimating the date. Additionally, he was unable to say whether claimant's conversation involved complaints regarding the alleged work injury or whether it was related to claimant's prior back surgery. He also did not hear any response from Mr. McClure, so it is unclear as to whether Mr. McClure heard that particular portion of the alleged conversation. Mr. McClure denied any such conversation ever took place.

The Administrative Law Judge, in denying that notice was timely given, specifically identified the testimony of Mr. McClure as being persuasive.

In workers' compensation litigation, it is claimant's burden to prove that he or she is entitled to the benefits requested by a preponderance of the credible evidence.[1]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[2]

K.S.A. 44-520 requires that notice of an accidental injury be given to respondent within 10 days of the date of accident. The notice to respondent would have had to have occurred within 10 business days of claimant's last day worked, that being May 6, 2002. Claimant's argument that she provided notice to Mr. McClure, her supervisor, is not supported by the majority of the testimony or any of the documentation placed into evidence. In fact, claimant's actions shortly after May 6, 2002, contradict that testimony. Claimant's attempts to obtain short-term disability and other benefits after leaving

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[1] *See* K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

[2] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

respondent all point to an ongoing, non-work-related problem with her back. The medical reports from the doctors' offices during the summer of 2002 also indicate that claimant's condition was not related to her work.

The Board finds, as did the Administrative Law Judge, that claimant has failed to prove that she provided timely notice of accident pursuant to K.S.A. 44-520.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge John D. Clark dated September 16, 2003, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 2003.

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Director